



## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 80

[EPA-HQ-OAR-2012-0223; FRL 9733-4 ]

#### **Regulation of Fuels and Fuel Additives: Modifications to Renewable Fuel Standard and Diesel Sulfur Programs**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Proposed Rule.

**SUMMARY:** EPA is proposing to amend the definition of heating oil in the Renewable Fuel Standard (RFS) program under section 211(o) of the Clean Air Act. This amendment would expand the scope of renewable fuels that can generate Renewable Identification Numbers (RINs) as heating oil to include fuel oil produced from qualifying renewable biomass that would be used to generate heat to warm buildings or other facilities where people live, work, recreate, or conduct other activities. Fuel oils used to generate process heat, power, or other functions would not be included in the amended definition. Producers or importers of fuel oil that meets the amended definition of heating oil would be allowed to generate RINs, provided that the fuel oil meets the other requirements specified in the RFS regulations. This proposed amendment would not modify or limit fuel included in the current definition of heating oil. We are also proposing amendments to the diesel sulfur program to provide additional flexibility for transmix processors that produce locomotive and marine diesel fuel. Specifically, we are proposing to reinstate an allowance for transmix processors to produce 500 parts per million (ppm) sulfur diesel fuel for use in older technology locomotive and marine diesel

outside of the Northeast Mid-Atlantic Area. We are also requesting comment on extending this allowance to outside of the Northeast Mid-Atlantic Area. These proposed amendments to the diesel transmix provisions are expected to result in reduced compliance costs for transmix processors and users of locomotive and marine diesel fuel while having a neutral or positive environmental impact. EPA is also proposing to amend the fuel marker requirements for 500 ppm sulfur locomotive and marine (LM) diesel fuel to address an oversight in the original rulemaking where the regulations failed to incorporate provisions described in the rulemaking preamble to allow for solvent yellow 124 marker to transition out of the distribution system.

**DATES:** Written comments must be received on or before [**insert date 30 days from date of publication in the Federal Register**], or 30 days from the date of the public hearing, if a public hearing is requested. A request for a public hearing must be received by [**insert date 15 days from date of publication in the Federal Register**]. If a public hearing is requested, we will publish a notice in the *Federal Register* announcing the date and location of the hearing at least 14 days prior to the hearing.

**ADDRESSES:** Submit your comments, identified by Docket ID No. EPA-HQ-OAR-2012-0223, by of the following methods:

- [www.regulations.gov](http://www.regulations.gov): Follow the on-line instructions for submitting comments.
- Email: [a-and-r-docket@epa.gov](mailto:a-and-r-docket@epa.gov), Attention Air and Radiation Docket ID EPA-HQ-OAR-2012-0223.
- Fax: 731-214-4051.

- Mail: Air and Radiation Docket, Docket No. EPA-HQ-OAR-2012-0223, Environmental Protection Agency, Mailcode: 6406J, 1200 Pennsylvania Ave., NW, Washington, DC 20460.
- Hand Delivery: EPA Docket Center, EPA/DC, EPA West, Room 3334, 1301 Constitution Ave., NW, Washington, DC, 20460, Attention Air and Radiation Docket, ID No. EPA-HQ-OAR-2012-0223. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

*Instructions:* Direct your comments to Docket ID No. EPA-HQ-OAR-2012-0223. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at [www.regulations.gov](http://www.regulations.gov), including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through [www.regulations.gov](http://www.regulations.gov) or e-mail. The [www.regulations.gov](http://www.regulations.gov) website is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through [www.regulations.gov](http://www.regulations.gov) your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification,

EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket visit the EPA Docket Center homepage at <http://www.epa.gov/epahome/dockets.htm>.

*Docket:* All documents in the docket are listed in the [www.regulations.gov](http://www.regulations.gov) index.

Although listed in the index, some information is not publicly available, (*e.g.*, CBI or other information whose disclosure is restricted by statute). Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in [www.regulations.gov](http://www.regulations.gov) or in hard copy at the Air and Radiation Docket and Information Center, EPA, EPA West, Room 3334, 1301 Constitution Ave., NW, Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566-1744, and the telephone number for the Air Docket is (202) 566-1742.

**FOR FURTHER INFORMATION CONTACT:** Kristien Knapp, Office of Transportation and Air Quality, Mail Code: 6405J, U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue, NW, 20460; telephone number: (202) 343-9949; fax number: (202) 343-2800; email address: [knapp.kristien@epa.gov](mailto:knapp.kristien@epa.gov).

## **SUPPLEMENTARY INFORMATION:**

### **I. Executive Summary**

#### **A. Purpose**

EPA is proposing to amend provisions in the renewable fuel standard (RFS) and diesel sulfur fuel programs. The RFS amendment would change the definition of home

heating oil, and the diesel sulfur amendments would provide additional flexibility for transmix processors who produce locomotive and marine diesel fuel, and allow solvent yellow 124 marker to transition out of the distribution system. EPA is proposing these amendments under section 211 of the Clean Air Act.

## B. Summary of Today's Rule

### *Amended Definition of Home Heating Oil*

EPA proposes to amend the definition of heating oil in 40 CFR § 80.1401 in the renewable fuel standard ("RFS" or "RFS2") program promulgated under section 211(o) of the Clean Air Act (CAA). This amendment will expand the scope of renewable fuels that can generate Renewable Identification Numbers ("RINs") as "home heating oil" to include fuel oil that will be used to generate heat to warm buildings or other facilities where people live, work, recreate, or conduct other activities. This rule would allow producers or importers of fuel oil that meets the amended definition of heating oil to generate RINs, provided that other requirements specified in the regulations are met. Fuel oils used to generate process heat, power, or other functions would not be approved for RIN generation under the amended definition of heating oil. The proposed amendment would not modify, limit, or change fuel included in the current definition of heating oil at 40 CFR § 80.2(ccc).

### *Diesel Transmix Amendments*

The proposed diesel transmix amendments would reinstate an allowance for transmix processors to produce 500 ppm sulfur diesel fuel for use in older technology locomotive and marine diesel outside of the Northeast Mid-Atlantic Area after 2014. EPA's ocean-going vessels rule forbade this allowance beginning 2014, because a new

stream of diesel fuel for ocean-going vessels, containing up to 1000 ppm sulfur, was introduced at that time, which we believed would provide a suitable outlet for transmix distillate product. Transmix processors stated that they were not aware of the changes to the 500-ppm LM transmix provisions until after they were finalized, and that the ocean-going vessels market would not be a viable outlet for their distillate product. Based on additional input that we received from transmix processors and other stakeholders in the fuel distribution system during our consideration of the petition, EPA believed that it would be appropriate to extend the 500-ppm diesel transmix flexibility beyond 2014. EPA finalized a settlement agreement and this DFR and NPRM are in accord with the settlement agreement. Our analysis indicates that extending this flexibility beyond 2014 will have a neutral or net beneficial effect on overall emissions.

#### *Yellow Marker Amendments*

The proposed yellow marker amendments address an oversight in EPA's original nonroad diesel rulemaking. In that rulemaking, the regulations failed to incorporate provisions described in the rulemaking preamble. The preamble made clear that EPA intended to allow 500 ppm locomotive marine (LM) diesel fuel containing greater than 0.10 milligrams per liter of Solvent Yellow 124 (SY124) time to transition out of the fuel distribution system. However, the regulations are not consistent with the preamble and did not provide this same allowance.

Specifically, the regulations as currently written do not provide any transition time for unmarked LM fuel delivered from a truck loading rack beginning June 1, 2012 to work its way through the fuel distribution system downstream of the truck loading rack. The proposed yellow marker amendments will allow 500 ppm LM diesel fuel at any point

in the fuel distribution and end use system to contain more than 0.10 milligrams per liter of SY 124 through November 30, 2012. This regulatory change would allow marked LM diesel fuel to transition normally through the LM fuel distribution and use system.

Today's proposed rule would also amend the regulation to clarify the transition of the solvent yellow 124 marker out of heating oil beginning June 1, 2014. After December 1, 2014, EPA proposed to no longer have any requirements with respect to the use of the SY 124 marker.

### C. Costs and Benefits

These three sets of proposed amendments attempt to provide new opportunities for RIN generation under the RFS program and necessary flexibilities and transition periods for those affected by EPA's transmix and marker requirements. Therefore, EPA believes that these amendments would impose no new direct costs or burdens on regulated entities beyond the minimal costs associated with reporting and recordkeeping requirements. At the same time, EPA does not believe that any of these amendments will adversely impact emissions.

## **II. Why is EPA Issuing a Proposed Rule?**

This document proposes to amend the definition of heating oil in 40 CFR § 80.1401 in the renewable fuel standard (RFS) program that was promulgated under section 211(o) of the Clean Air Act. This amendment would expand the scope of fuels that can generate RINs as home heating oil to include fuel oil that would be used to generate heat to warm buildings or other facilities where people live, work, recreate, or conduct other activities. This document also proposes amendments to the diesel sulfur program to provide additional flexibility to transmix processors to produce locomotive

and marine (LM) diesel fuel. Specifically, we are proposing to reinstate an allowance for transmix processors to produce 500 ppm sulfur diesel fuel for use in older technology locomotive and marine diesel outside of the Northeast Mid-Atlantic Area (“NEMA”). We are also requesting comment on extending this allowance to the NEMA. These proposed amendments to the diesel transmix provisions are expected to result in reduced compliance costs for transmix processors and users of LM diesel fuel while having a neutral or positive environmental impact. Lastly, this document proposes to amend the fuel marker requirements for 500 ppm sulfur locomotive and marine (LM) diesel fuel to address an oversight in the original rulemaking where the regulations failed to incorporate provisions described in the rulemaking preamble to allow for solvent yellow 124 marker to transition out of the distribution system.

We are publishing a separate document that will serve as a direct final rule in the “Rules and Regulations” section of this *Federal Register*. The direct final rule amends the definition of heating oil and allows transmix processors to produce locomotive and marine diesel fuel. The direct final rule does not attempt to extend the transmix allowance to the NEMA; we request comments on that issue only in this document. If we receive no adverse comment on the direct final rule, or any portion of the direct final rule, by the date provided in the **DATES** section above, the amendments to the definition of heating oil and the amendments to the diesel transmix provisions that apply outside the NEMA will become final. If EPA receives relevant adverse comment on the direct final rule, any portion of the direct final rule, or a hearing request, we will publish a timely withdrawal of the direct final rule or the portion receiving adverse comments in the *Federal Register*.



We will address all public comments in any subsequent final rule based on this proposed rule. We will not institute a second comment period on this action. Any parties interested in commenting must do so at this time. For further information about commenting on this rule, see the **ADDRESSES** section of this document.

### **III. Does This Action Apply to Me?**

Entities potentially affected by this action include those involved with the production, distribution and sale of transportation fuels, including gasoline and diesel fuel, or renewable fuels such as ethanol and biodiesel, as well as those involved with the production, distribution and sale of other fuel oils that are not transportation fuel.

Regulated categories and entities affected by this action include:

<b>Category</b>	<b>NAICS Codes<sup>a</sup></b>	<b>SIC Codes<sup>b</sup></b>	<b>Examples of Potentially Regulated Parties</b>
Industry	324110	2911	Petroleum refiners, importers.
Industry	325193	2869	Ethyl alcohol manufacturers.
Industry	325199	2869	Other basic organic chemical manufacturers.
Industry	Various	Various	Transmix Processors
Industry	424690	5169	Chemical and allied products merchant wholesalers.
Industry	424710	5171	Petroleum bulk stations and terminals.
Industry	424720	5172	Petroleum and petroleum products merchant wholesalers.
Industry	454319	5989	Other fuel dealers.

<sup>a</sup>North American Industry Classification System (NAICS).

<sup>b</sup>Standard Industrial Classification (SIC) system code.

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be regulated by this action. This table lists the types of entities that EPA is now aware could be potentially regulated by this action. Other types of

entities not listed in the table could also be regulated. To determine whether your entity is regulated by this action, you should carefully examine the applicability criteria of Part 80, subparts D, E and F of title 40 of the Code of Federal Regulations. If you have any question regarding applicability of this action to a particular entity, consult the person in the preceding “FOR FURTHER INFORMATION CONTACT” section above.

#### **IV. What Should I Consider as I Prepare My Comments for EPA?**

*A. Submitting information claimed as CBI.* Do not submit this information to EPA through [www.regulations.gov](http://www.regulations.gov) or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD ROM that you mail to EPA, mark the outside of the disk or CD ROM as CBI and then identify electronically within the disk or CD ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR Part 2.

*B. Tips for Preparing Your Comments.* When submitting comments, remember to:

- Identify the rulemaking by docket number and other identifying information (subject heading, *Federal Register* date and page number).
- Follow directions - The agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.
- Explain why you agree or disagree; suggest alternatives and substitute

language for your requested changes.

- Describe any assumptions and provide any technical information and/or data that you used.
- If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.
- Provide specific examples to illustrate your concerns, and suggest alternatives.
- Explain your views as clearly as possible, avoiding the use of profanity or personal threats.
- Make sure to submit your comments by the comment period deadline identified.

*C. Docket Copying Costs.* You may be charged a reasonable fee for photocopying docket materials, as provided in 40 CFR Part 2.

## **V. Renewable Fuel Standard Program Amendments**

### **A. Amended Definition of Heating Oil**

EPA is issuing this proposed rule to amend the definition of heating oil in 40 CFR § 80.1401 in the renewable fuel standard (“RFS” or “RFS2”) program promulgated under section 211(o) of the Clean Air Act (CAA).<sup>1</sup> This amendment would expand the scope of renewable fuels that can generate Renewable Identification Numbers (RINs) as “home heating oil” to include fuel oil that would be used to generate heat to warm buildings or other facilities where people live, work, recreate, or conduct other activities. This proposed rule would allow producers or importers of fuel oil that meets the amended

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<sup>1</sup> The Energy Independence and Security Act (EISA) of 2007 amended section 211(o) of the Clean Air Act (CAA), which was originally added by the Energy Policy Act (EPA) of 2005.

definition of heating oil to generate RINs, provided that other requirements specified in the regulations are met. Fuel oils used to generate process heat, power, or other functions will not be approved for RIN generation under the amended definition of heating oil, as these fuels are not within the scope of “home heating oil” as that term is used in the Energy Independence and Security Act of 2007 (“EISA”), for the RFS program. The proposed amendment would not modify or limit fuel included in the current definition of heating oil at 40 CFR § 80.2(ccc).

The RFS2 program requires the production and use of renewable fuel to replace or reduce the quantity of fossil fuel present in transportation fuel. Under EPA’s RFS program this is accomplished by providing for the generation of RINs by producers or importers of qualified renewable fuel. RINs are transferred to the producers or importers of gasoline and diesel transportation fuel who then use the RINs to demonstrate compliance with their renewable fuel volume obligations. RINs also serve the function of credits under the RFS program.

Congress provided that EPA could also establish provisions for the generation of credits by producers of certain renewable fuel that was not used in transportation fuel, called “additional renewable fuel.”<sup>2</sup> Additional renewable fuel is defined as fuel that is produced from renewable biomass and that is used to replace or reduce the quantity of fossil fuel present in home heating oil or jet fuel.<sup>3</sup> In essence, additional renewable fuel has to meet all of the requirements applicable to qualify it as renewable fuel under the regulations, with the only difference being that it is blended into or is home heating oil or

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<sup>2</sup> “EISA changed the definition of ‘renewable fuel’ to require that it be made from feedstocks that qualify as ‘renewable biomass.’ EISA’s definition of the term ‘renewable biomass’ limits the types of biomass as well as the types of land from which the biomass may be harvested.” Regulation of Fuels and Fuel Additives: Changes to Renewable Fuel Standard Program, 75 FR 14670, 14681 (March 26, 2010).

<sup>3</sup> See CAA sections 211(o)(1)(A) and (o)(5)(E).

jet fuel. This does not change the volume requirements of the statute itself, however this can provide an important additional avenue for parties to generate RINs for use by obligated parties, thus promoting the overall cost-effective production and use of renewable fuels.

EPA addressed the provision for additional renewable fuels in the RFS2 rulemaking, specifically addressing the category of “home heating oil.” EPA determined that this term was ambiguous, and defined it by incorporating the existing definition of heating oil at 40 CFR § 80.2(ccc). EPA stated that:

EISA uses the term “home heating oil” in the definition of “additional renewable fuel.” The statute does not clarify whether the term should be interpreted to refer only to heating oil actually used in homes, or to all fuel of a type that can be used in homes. We note that the term ‘home heating oil’ is typically used in industry in the latter manner, to refer to a type of fuel, rather than a particular use of it, and the term is typically used interchangeably in industry with heating oil, heating fuel, home heating fuel, and other terms depending on the region and market. We believe this broad interpretation based on typical industry usage best serves the goals and purposes of the statute. If EPA interpreted the term to apply only to heating oil actually used in homes, we would necessarily require tracking of individual gallons from production through ultimate [use] in homes in order to determine eligibility of the fuel for RINs. Given the fungible nature of the oil delivery market, this would likely be sufficiently difficult and potentially expensive so as to discourage the generation of RINs for renewable fuels used as home heating oil. This problem would be similar to that which arose under RFS1 for certain renewable fuels (in particular biodiesel) that were produced for the highway diesel market but were also suitable for other markets such as heating oil and non-road applications where it was unclear at the time of fuel production (when RINs are typically generated under the RFS program) whether the fuel would ultimately be eligible to generate RINs. Congress eliminated the complexity with regards to non-road applications in RFS2 by making all fuels used in both motor vehicle and nonroad applications subject to the renewable fuel standard program. We believe it best to interpret the Act so as to also avoid this type of complexity in the heating oil context. Thus, under today’s regulations, RINs may be generated for renewable fuel used as ‘heating oil,’ as defined in existing EPA regulations at §80.2(ccc). In addition to simplifying implementation and administration of the Act, this

interpretation will best realize the intent of EISA to reduce or replace the use of fossil fuels.<sup>4</sup>

The existing definition of heating oil at 40 CFR § 80.2(ccc) means “any #1, #2, or non-petroleum diesel blend that is sold for use in furnaces, boilers, stationary diesel engines, and similar applications and which is commonly or commercially known or sold as heating oil, fuel oil, or similar trade names, and that is not jet fuel, kerosene, or [Motor Vehicle, Nonroad, Locomotive, and Marine (MVNRLM)] diesel fuel.” The existing definition of non-petroleum diesel at 40 CFR § 80.2(sss) means a diesel that contains at least 80 percent mono-alkyl esters of long chain fatty acids derived from vegetable oils or animal fats. Thus, in order to generate RINs for home heating oil that is a non-petroleum diesel blend, the fuel must contain at least 80 percent mono-alkyl esters of long chain fatty acids derived from vegetable oils or animal fats, as well as meeting all other requirements of the RFS2 regulations. Since the promulgation of the RFS2 final rule, we have received a number of requests from producers to consider expanding the scope of the home heating oil provision to include additional fuel oils that are produced from qualifying renewable biomass but do not meet the regulatory definition of heating oil because they are not #1 or #2 diesel and do not contain at least 80 percent mono-alkyl esters. Parties raising this issue have suggested that limiting “home heating oil” to the fuel types defined in 40 CFR § 80.2(ccc) disqualifies certain types of renewable fuel oils that could be used for home heating and that this limitation does not align with our reasoning in the preamble to take a broad interpretation of the term “home heating oil” in CAA section 211(o).

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<sup>4</sup> 75 FR 14670, 14687 (March 26, 2010).

EPA has considered this issue further and is proposing to revise the definition of heating oil in the RFS program to expand the scope of fuels that can generate RINs as heating oil. EPA is proposing to revise the definition such that RINs also may be generated by renewable fuel that is fuel oil and is used to heat interior spaces of homes or buildings to control ambient climate for human comfort. This would not include fuel oils used to generate process heat, power, or other functions. The fuel oil would be used to generate heat to warm buildings or other facilities where people live, work, recreate, or conduct other activities. The fuel oil would only be used in heating applications, where the sole purpose of the fuel's use is for heating and not for any other combined use such as process energy use. We are proposing to amend the existing definition of heating oil in 40 CFR § 80.1401 to include fuel oils that are used in this way. This is in addition to the fuel oils currently included in the definition of heating oil at 40 CFR § 80.2(ccc), and would not modify or limit the fuel included in the current definition.

EPA believes this expansion of the scope of the home heating oil provision is appropriate and authorized under CAA section 211(o). As EPA described in the RFS2 final rule, Congress did not define the term “home heating oil,” and it does not have a fixed or definite commercial meaning. In the RFS2 final rulemaking, EPA focused on whether the provision was limited to heating oil actually used in homes. EPA noted that the term home heating oil is usually used in the industry to refer to a type of fuel, and not to one specific use for the fuel. Given this more specific usage of the term, and the practical barriers that would arise if the term was defined as fuel actually used to heat homes, EPA defined the scope of home heating oil by identifying those types of fuel oils that are typically used to heat homes. EPA determined this was a reasonable

interpretation of an ambiguous statutory provision that simplified implementation and administration of the Act and promoted achievement of the goals of the RFS program.

In the RFS2 rulemaking, EPA focused on the kinds of fuel oils that can be used to heat homes. The expansion of the definition proposed in this rulemaking would address two types of fuel oils not included in the current definition of heating oil. First, the proposed definition would include additional fuel oils that are actually used to heat homes, even if they do not meet the current definition of heating oil. This is clearly within the scope of the statutory provision for home heating oil.

Second, the proposed definition would include fuel oils that are used to heat facilities other than homes to control ambient climate for human comfort. Under the current definition of heating oil, a fuel oil meets the definition based on its physical properties and its use in furnaces, boilers, stationary diesel engines, and similar applications, not whether it is actually used to heat a home. The basic decision made in the RFS2 final rulemaking was to allow RIN generation for the group of fuel oils that are typically used for home heating purposes. Under the current definition the relationship of the fuel oil to heating homes is that the fuel oil is of the type that is typically used for and can be used for that purpose.<sup>5</sup>

In the proposed amended definition, qualifying fuel oils would be used for heating places where people live, work, or recreate, and not just their homes. It focuses more on what is getting heated – people – and not where the people are located. EPA believes this is a reasonable interpretation of the phrase “home heating oil,” while recognizing that it is not an obvious interpretation. This interpretation recognizes the

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<sup>5</sup> This is different from other renewable fuels in the RFS program, which are defined in terms of their use as transportation fuel or jet fuel. *See* 40 CFR § 80.1401, definitions of “renewable fuel” and “transportation fuel.”



ambiguity of the phrase used by Congress, which is not defined and does not have a clear and definite commercial meaning. It gives reasonable meaning to the term home heating oil, by limiting the additional fuel oils to fuel oils when used for heating of facilities that people will occupy, and excluding fuel oils when used for other purposes such as generation of energy used in the manufacture of products. It also focuses on the aspect of home that is important here – the heating of people – recognizing that EPA has already determined that fuel oil can be included in the scope of home heating oil even if it is not actually used to heat a home. This interpretation will also promote the purposes of the EISA and the RFS program. It will promote the purposes of the EISA in that it will increase the production and use of renewable fuels by introducing new sources of fuel producers to the RFS program. It will specifically promote the RFS programmatic goals by facilitating the generation of RINs for renewable fuels that reduce emissions of greenhouse gases compared to fossil fuels. For example, EPA has received information from Envergent Technologies (an alliance of Ensyn and Honeywell) that such an expanded definition of heating oil would result in nearly immediate production of 3.5 million gallons from their existing facilities, with an additional projected production of up to 45 million gallons per year within 24 months following regulatory action. Based on this information from Envergent Technologies, application of the expanded definition of heating oil to the entire industry would result in the production of many more million additional gallons of renewable fuel. Although EPA believes the expanded definition in the regulations of “heating oil” would be a reasonable interpretation of the intent of Congress to allow additional renewable fuel to count towards the volume mandates if it is

produced from renewable biomass and is used to replace or reduce the quantity of fossil fuel present in home heating oil, EPA invites comment on this interpretation.

For the text of the proposed regulatory changes please see the direct final rule, located in the “Rules and Regulations” section of this *Federal Register*.

## **B. Lifecycle Greenhouse Gas Assessment of the Amended Definition of Heating Oil**

EPA has also evaluated whether any revisions would need to be made to Table 1 to 40 CFR § 80.1426 that lists the applicable D codes for each fuel pathway for use in generating RINs in the RFS2 regulations in light of the additional fuel oils included in the expanded definition of heating oil. As discussed below, EPA has determined that the applicable D code entries for heating oil in Table 1 to 40 CFR § 80.1426 would continue to be appropriate and would not need to be revised in light of the expanded definition of heating oil.

Under the RFS program, EPA must assess lifecycle greenhouse gas (GHG) emissions to determine which fuel pathways meet the GHG reduction thresholds for the four required renewable fuel categories. The RFS program requires a 20% reduction in lifecycle GHG emissions for conventional renewable fuel (except for grandfathered facilities and volumes), a 50% reduction for biomass-based diesel or advanced biofuel, and a 60% reduction for cellulosic biofuel. For the final RFS2 rule, EPA assessed the lifecycle greenhouse gas emissions of multiple renewable fuel pathways and classified pathways based on these GHG thresholds, as compared to the EISA statutory baseline.<sup>6</sup> In addition, EPA has added several pathways since the final rule was published. Expanding the definition of heating oil does not affect these prior analyses.

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<sup>6</sup> See Table 1 to 40 CFR § 80.1426.

The fuel pathways consist of fuel type, feedstock, and production process requirements. GHG emissions are assessed at all points throughout the lifecycle pathway. For instance, emissions associated with sowing and harvesting of feedstocks and in the production, distribution and use of the renewable fuel are examples of what are accounted for in the GHG assessment. A full accounting of emissions is then compared with the petroleum baseline emissions for the transportation fuel being replaced. The lifecycle GHG emissions determination is one factor used to determine compliance with the regulations.

There are currently several fuel pathways that list heating oil as a fuel type with various types of feedstock and production processes used, qualifying the heating oil pathways as either biomass-based diesel, advanced, or cellulosic. The determinations for these different pathways were based on the current definition of heating oil. The pathways also include several types of distillate product including diesel fuel, jet fuel and heating oil.

The lifecycle calculations and threshold determinations are based on the GHG emissions associated with production of the fuel and processing of the feedstock. Converting biomass feedstocks such as triglycerides (if oils are used as feedstock) or hemi-cellulose, cellulose, lignin, starches, etc. (if solid biomass feedstock is used) into heating oil products and can be accomplished through either a biochemical or thermochemical process converting those molecules into a fuel product. The existing heating oil pathways were based on the current definition of the fuel, and were based on a certain level of processing to produce #1, #2, or a non-petroleum diesel blend and the

related energy use and GHG emissions that were part of the lifecycle determination for those fuel pathways.

The main difference between the current definition of heating oil, which refers to #1, #2, or a non-petroleum diesel blend, and the expanded definition that is proposed in this rulemaking is that the expanded definition would include heavier types of fuel oil with larger molecules. Based on the type of conversion process, producing these heavier fuel oil products versus the #1, #2, or a non-petroleum diesel blend would affect the amount of energy used and therefore the GHG emissions from the process. There are two main paths for producing a fuel oil product from biomass. In one the biomass is converted into a biocrude which is further refined into lighter products. In this case producing a heavier fuel oil product would require less processing energy and have lower GHG emissions than converting the same feedstock into a #1, #2, or non-petroleum diesel blend.

In the other type of process the compounds in the biomass are changed into a set of intermediary products, such as hydrogen (H) and carbon monoxide (CO).<sup>7</sup> These compounds are then either catalytically or biochemically converted into the fuel product. In this case, the vast majority of the energy is associated with breaking down the feedstock into the set of intermediary compounds. The process used and the energy needed for it does not vary based on the type of fuel that is then produced from these intermediary compounds. The type of fuel could affect the type of catalyst or biological process used to change the intermediary compounds into the fuel product, but based on

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<sup>7</sup> This describes the Fischer-Tropsch process. Other processes rely on forming different sets of compounds from the biomass, and then producing the fuel product from the set of compounds.

EPA calculations and assessments developed as part of the RFS2 rulemaking,<sup>8</sup> this will have no real impact on the energy used or the GHG emissions associated with converting the biomass into a different fuel product.

Based on these considerations, EPA believes the GHG emissions associated with producing the fuel oil included in the expanded definition would be the same or lower than the GHG emissions associated with producing #1, #2, or non-petroleum diesel blend. Therefore, EPA believes the prior life cycle analysis for heating oil would support applying the existing pathways for fuel oil in the RFS2 regulations to the expanded definition of heating oil. All of the pathways currently applicable to heating oil under Table 1 to 40 CFR § 80.1426 would apply to the expanded definition of heating oil. EPA invites comments whether there are any other factors to consider in addition to the reasons discussed above for extending the lifecycle analysis already conducted for heating oil in the final rulemaking for fuel oils under the expanded definition of heating oil.

For the text of the proposed regulatory changes please see the direct final rule, located in the “Rules and Regulations” section of this *Federal Register*.

### **C. Additional Registration, Reporting, Product Transfer Document and Recordkeeping Requirements**

#### **1. Additional Requirements for the Amended Definition of Heating Oil**

An important issue to address is how to implement such an expanded definition. As EPA recognized in the RFS2 rulemaking, fuel oils end up being used in a variety of

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<sup>8</sup> “Regulation of Fuel and Fuel Additives; Changes to Renewable Fuel Standard Program,” 75 FR 14670, available at <http://www.gpo.gov/fdsys/pkg/FR-2010-03-26/pdf/2010-3851.pdf>. See also, EPA’s summary factsheet, “EPA Lifecycle Analysis of Greenhouse Gas Emissions from Renewable Fuels,” available at <http://www.epa.gov/otaq/renewablefuels/420f10006.pdf>.

different uses, where the fuel producer may have little knowledge at the time of production as to eventual use of the fuel. This is especially the case where the fuel oil is distributed in a fungible distribution system. EPA addressed this in the RSF2 rulemaking by defining home heating oil as a type of fuel with certain characteristics, irrespective of where it was used. This approach avoided the need to track the fuel to its actual use, and including the characteristics of the fuel in its definition in 40 CFR § 80.1401 was adequate to retain a close tie to the concept underlying home heating oil.

The proposed expansion of the definition raises this same issue but in a more significant way. While the proposed expansion of the definition includes some limited physical characteristics that fuel oils would need to meet in order to qualify for generating RINs, it does not provide sufficient specificity to differentiate between those fuels oils used to heat buildings for climate control for human comfort and those used to generate process heat or other purposes. Therefore, for eligible fuel oils other than those qualifying under the existing definition in 40 CFR § 80.2(ccc), EPA is proposing that the renewable fuel producer or importer have adequate documentation to demonstrate that the fuel oil volume for which RINs were generated was used to heat buildings for climate control for human comfort and meets the expanded definition of heating oil in order to generate RINs.

EPA recognizes that under the current definition of heating oil no tracking or other documentation of end use is required, and some heating oils that meet the current definition could end up being used for other purposes. However, in all cases the heating oil under the current definition has to have the physical or other characteristics that tie it to the type of fuel oil used to heat homes. In addition, because these fuel oils would

qualify to generate RINs under the RFS program, it will likely lead to their use for heating of buildings, and not for generation of process heat. For the fuel oils included in the expanded definition, the tie to home heating oil would not be the physical characteristics of the fuel oil but instead its actual usage for heating for the purposes of climate control for human comfort.

In order to verify that the fuel oils are actually used to generate heat for climate control purposes, EPA is proposing the following registration, recordkeeping, product transfer document (PTD) and reporting requirements. These proposed requirements would not apply to fuels qualifying under existing 40 CFR § 80.2(ccc) of the regulations. We are also proposing that if RINs are generated for fuel oils under the expansion of the scope of home heating oil in today's rule, and those fuel oils are designated for but not actually used to generate heat for climate control purposes, but for some other purpose, all parties involved in either the generation, assignment, transfer or use of that RIN, including the end user of that fuel oil, are subject to and liable for violations of the RFS2 regulations and the CAA.

For the text of the proposed regulatory changes please see the direct final rule, located in the "Rules and Regulations" section of this *Federal Register*.

**a. Registration**

For the purpose of registration, EPA is proposing to allow the producer of the expanded fuel oil types to establish their facility's baseline volume in the same manner as all other producers under the RFS program, e.g., based on the facility's permitted capacity or actual peak capacity. Additionally though, we are proposing to require producers of the expanded fuel oil types to submit affidavits in support of their

registration, including a statement that the fuel will be used for the purposes of heating interior spaces of homes or buildings to control ambient climate for human comfort, and no other purpose. We also propose to require that producers submit secondary affidavits from the existing end users to verify that the fuel is actually being used for a qualifying purpose. We are also proposing new reporting, product transfer documents (PTD), and recordkeeping requirements discussed below that will be used as a means for verification that the qualifying fuel is being used in an approved application. We believe these requirements are necessary to assure confidence that the fuel used to generate RINs is actually used for a qualifying purpose because these types of fuel have not previously been used as heating oil, and are not readily identifiable by their physical characteristics. Without such safeguards, EPA could not be confident that the fuel is used as heating oil, and end users might not have adequate notice that the fuel must be used as heating oil. EPA believes these requirements will place a small burden on producers and end users, and greatly benefit the integrity of the program.

The proposed registration requirements are detailed in the registration section in 40 CFR § 80.1450(b)(1)(ix) in the direct final rule located in the “Rules and Regulations” section of this *Federal Register*.

**b. Reporting, Product Transfer Documents and Recordkeeping Requirements**

For the purpose of continued verification after registration, EPA is proposing additional requirements for reporting in § 80.1451(b)(1)(ii)(T), PTDs in § 80.1453(d), and recordkeeping in 40 CFR § 80.1454(b), for the expanded fuel oil types.



The proposed reporting, PTD, and recordkeeping requirements will help ensure that the expanded fuel oil types that are used to generate RINs are actually used in a qualifying application. For reporting, producers would be required to file quarterly reports with EPA that identify certain information about the volume of fuel oil produced and used as heating oil. The additional reporting requirements would stipulate that the producer of fuel oils submit affidavits to EPA reporting the total quantity of the fuel oils produced, the total quantity of the fuel oils sold to end users, and the total quantity of fuel oils sold to end users for which RINs were generated. Additionally, affidavits from each end user would need to be obtained by the producer and reported to EPA, describing the total quantity of fuel oils received from the producer, the total amount of fuel oil used for qualifying purposes, the date the fuel oil was received from the producer, the blend level of the fuel oil, quantity of assigned RINs received with the renewable fuel, and quantity of assigned RINs that the end user separated from the renewable fuel, if applicable.<sup>9</sup> The additional product transfer document requirement associated with the expanded definition of heating oil would require that a PTD must be prepared and maintained between the fuel oil producer and the final end user for the legal transfer of title or custody of a specific volume of fuel oil that is designated for use, and is actually used, only for the purpose of heating interior spaces of buildings to control ambient climate for human comfort. This additional PTD requirement would require that the PTD used to transfer ownership or custody of the renewable fuel must contain the statement: “This volume of renewable fuel is designated and intended to be used to heat interior spaces of homes or

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<sup>9</sup> EPA does not expect that the expanded definition of home heating oil will result in an obligation on home owners or small businesses. Based on our analysis of the market, qualifying fuel oil is expected to be used in large industrial settings or apartment buildings, not in individual homes. Therefore, EPA anticipates that the information it is requiring would be readily available and producible by these entities.

buildings to control ambient climate for human comfort. Do NOT use for process heat or any other purpose, pursuant to 40 CFR § 80.1460(g).” EPA believes that this PTD requirement will help to ensure that each gallon of fuel oil that is transferred from the producer to the end user is used for qualifying purposes under the expanded definition of heating oil. If the fuel oil is sent to the end user, but the fuel oil is not actually used to generate heat for climate control purposes, but for some other non-qualifying purpose, then the RINs that were generated for that fuel oil would need to be immediately retired and reported under 40 CFR § 80.1451. The additional recordkeeping requirement we are proposing would require that producers keep copies of the contracts which describe the fuel oil under contract with each end user. Consistent with existing regulations, producers are required to maintain all documents and records submitted for registration, reporting, and PTDs as part of the producer’s recordkeeping requirements. EPA believes the producer’s maintenance of these records will allow for continued tracking and verification that the end use of the fuel oil is in compliance with the expanded definition of heating oil.

The proposed reporting, PTD, and recordkeeping requirements are detailed in the direct final rule located in the “Rules and Regulations” section of this *Federal Register*. EPA invites comments for any other factors to consider regarding these additional requirements for registration, reporting, PTDs, and recordkeeping.

#### **D. Additional Requirement for RIN Generation**

We are also proposing to amend the regulatory text that describes the general requirements for how RINs are generated and assigned to batches of renewable fuel by renewable fuel producers and importers. This would explicitly clarify a requirement that

always existed: that producers and importer of renewable fuel who generate RINs must comply with the registration requirements of 40 CFR § 80.1450, the reporting requirements of 40 CFR § 80.1451, the recordkeeping requirements of 40 CFR § 80.1454, and all other applicable regulations of this subpart M. This is a generally applicable requirement – not specific to fuel meeting the definition of home heating oil. *See* amended section 80.1426(a)(1)(iii).

## **VI. Amendments Related to Transmix**

The final regulations for the nonroad diesel program were published in the *Federal Register* on June 24, 2004 (69 FR 38958). The provisions in the nonroad diesel rule related to transmix processors were modified by the Category 3 Marine diesel final rule that was published on April 30, 2010 (75 FR 22896). This action proposes additional amendments to the requirements for diesel fuel produced by transmix processors. Below is a table listing the provisions that we are proposing to amend. The following sections provide a discussion of these proposed amendments and of additional potential changes to the diesel transmix provisions that we are considering.

<b>Proposed Amendments to the Diesel Program Section</b>	<b>Description</b>
80.511(b)(4)	Amended to allow for the production and sale of 500-ppm locomotive and marine (LM) diesel fuel produced from transmix past 2014.
80.513 (entire section)	Amended to allow for the production and sale of 500-ppm LM diesel fuel produced from transmix past 2014.

80.572(d)	Amended to extend 500ppm LM diesel fuel label past 2012.
80.597(d)(3)(ii)	Amended to include 500-ppm LM diesel fuel in the list of fuels that an entity may deliver or receive custody of past June 1, 2014.

**A. Consideration of Extending the Diesel Transmix Provisions Outside of the Northeast Mid-Atlantic Area and Alaska Beyond 2014**

Batches of different fuel products commonly abut each other as they are shipped in sequence by pipeline. When the mixture between two adjacent products is not compatible with either product, it is removed from the pipeline and segregated as transmix. Transmix typically is gathered for reprocessing at the end of the fuel distribution system far from a refinery. In addition to the long transportation distances to return transmix to a refinery for reprocessing, incorporating transmix into a refinery's feed also presents technical and logistical refining process challenges that typically make refinery reprocessing an unattractive option. Thus, transmix processors provide a valuable service in maintaining an efficient fuel distribution system. Transmix processing facilities handle very low volumes of fuel compared to a refinery and hence are limited to the use of a simple distillation tower and additional blendstocks to manufacture finished fuels. There is currently no desulfurization equipment which has been demonstrated to be suitable for application at a transmix processor facility. The cost of installing and operating a currently available desulfurization unit is too high in relation to the small volume of distillate fuel produced at transmix processing facilities. Some products shipped by pipeline such as jet fuel and heating oil are subject to relatively high

sulfur specifications (*e.g.*, maximum 3,000 ppm for jet fuel). The presence of such high sulfur products in multi product pipelines and consequently in transmix constrains the ability of transmix processors to produce a low sulfur distillate product.

The engine emissions standards finalized in the nonroad diesel rulemaking for new nonroad, locomotive, and Category 1 & 2 (C1 & C2) marine engines necessitates the use of sulfur-sensitive emissions control equipment which requires 15-ppm sulfur diesel fuel to function properly.<sup>10</sup> Accordingly, the nonroad rule required that nonroad, locomotive and marine (NRLM) diesel fuel must meet a 15-ppm sulfur standard in parallel with the introduction of new sulfur-sensitive emissions control technology to NRLM equipment. Beginning June 1, 2014, the nonroad diesel rule required that all NRLM diesel fuel produced by refiners and importers must meet a 15-ppm sulfur standard. The nonroad diesel rule included special provisions to allow the continued use of 500-ppm sulfur locomotive and marine (LM) diesel fuel produced from transmix beyond 2014 in older technology engines as long as such engines remained in the in-use fleet. These provisions along with other now expired flexibilities in the diesel program were designed to minimize and postpone the impacts on transmix processors of transitioning to a condition where all highway, nonroad, locomotive, and marine diesel engines can only operate on 15-ppm diesel fuel.<sup>11</sup> The 500-ppm LM diesel transmix provisions were limited to areas outside of the Northeast Mid-Atlantic Area (NEMA) and

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<sup>10</sup> Control of Emissions of Air Pollution from Nonroad Diesel Engines and Fuel, Final Rule, 69 FR 38958 (June 24, 2004).

<sup>11</sup> As discussed in the original nonroad diesel rulemaking, as LM equipment is retired from service, the market for 500 ppm LM will gradually diminish and eventually disappear. Given the long lifetime of LM equipment (in many cases 40 years or more), we anticipate that a market for 500 ppm LM will remain for a significant amount of time. This phase-out time will also allow transmix processors to transition to their >15ppm sulfur distillate product to other markets (C3 marine, heating oil, process heat). It may also allow sufficient time for the introduction of desulfurization equipment that is suitable for use at transmix processing facilities.

Alaska because it was judged that the heating oil market in these areas would provide a sufficient outlet for transmix distillate in these areas.<sup>12</sup> Excluding the NEMA area and Alaska also allowed us to exempt the NEMA area and Alaska from the fuel marker provisions that are a part of the compliance assurance regime. The continuation of the 500-ppm LM diesel transmix provisions beyond 2014 (finalized in the nonroad rule) was supported by ongoing recordkeeping, reporting, and fuel marker provisions that were established to facilitate enforcement during the phase in of the diesel sulfur program.<sup>13</sup>

In the development of the proposed requirements for Category 3 (C3) marine engines, EPA worked with industry to evaluate how the enforcement provisions for the new 1,000-ppm C3 marine diesel fuel to be introduced in June of 2014 could be incorporated into existing diesel program provisions.<sup>14</sup> Our assessment based on input from industry at the time indicated that incorporating the new C3 marine fuel into the diesel program enforcement mechanisms while preserving the 500-ppm diesel transmix flexibility could not be accomplished without retaining significant existing burdens and introducing new burdens on a broad number of regulated parties. We also concluded that the new C3 marine diesel market would provide a sufficient outlet for transmix processors distillate product in place of the 500-ppm LM diesel market. Thus, we believed the 500-ppm LM diesel transmix flexibility would no longer be needed after

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<sup>12</sup> The NEMA area is defined in 40 CFR § 80.510(g)(1) as follows: (1) Northeast/Mid-Atlantic Area, which includes the following States and counties, through May 31, 2014: North Carolina, Virginia, Maryland, Delaware, New Jersey, Connecticut, Rhode Island, Massachusetts, Vermont, New Hampshire, Maine, Washington DC, New York (except for the counties of Chautauqua, Cattaraugus, and Allegany), Pennsylvania (except for the counties of Erie, Warren, McKean, Potter, Cameron, Elk, Jefferson, Clarion, Forest, Venango, Mercer, Crawford, Lawrence, Beaver, Washington, and Greene), and the eight eastern-most counties of West Virginia (Jefferson, Berkeley, Morgan, Hampshire, Mineral, Hardy, Grant, and Pendleton).

<sup>13</sup> This included the now-completed phase-in of 15 ppm highway diesel fuel and 15 ppm nonroad diesel fuel as well as the phase-out of the small refiner and credits provisions for LM diesel fuel that will be completed in 2014.

<sup>14</sup> Control of Emissions From New Marine Compression-Ignition Engines at or Above 30 Liters per Cylinder; Proposed Rule, 74 FR 44442 (August 28, 2009).

2014. Hence, we requested comment on whether we should eliminate the 500-ppm LM transmix provisions in parallel with the implementation of the C3 marine diesel sulfur requirement. This approach allowed for a significant reduction in the regulatory burden on a large number of industry stakeholders through the retirement of the diesel program's designate-and-track and fuel marker requirements. All of the comments that we received on the proposed rule were supportive of the approach. Consequently, we finalized the approach in the C3 marine final rule that was published on April 30, 2010.<sup>15</sup>

EPA received a petition from a group of transmix processors on June 29, 2010, requesting that the Agency reconsider and reverse the 2014 sunset date for the 500-ppm LM transmix flexibility.<sup>16</sup> A parallel petition for regulatory review was filed with the U.S. Court of Appeals, D.C. Circuit.<sup>17</sup> The transmix processors stated that they were not aware of the changes to the 500-ppm LM transmix provisions until after they were finalized. The petitioners also stated that they believe that the C3 marine market would not be a viable outlet for their distillate product given the increased distribution costs compared to the 500-ppm LM market. Based on the additional input that we received from transmix processors and other stakeholders in the fuel distribution system during our consideration of the petition, EPA believes that while the increased costs for transportation of transmix distillate product could be accommodated, there is no

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<sup>15</sup> Control of Emissions From New Marine Compression-Ignition Engines at or Above 30 Liters per Cylinder; Final Rule, April 30, 2010, 75 FR 22896.

<sup>16</sup> Petition to Reconsider Final Rule: Control of Emissions from New Marine Compression Ignition Engines at or Above 30 Liters per Cylinder; Final Rule, 75 FR 22,896 (April 30, 2010), Letter to EPA Administrator Lisa Jackson dated June 29, 2010, from Chet Thompson of Crowell and Moring LLP, on behalf of Allied Energy Company, Gladieux Trading and Marketing, Insight Equity Acquisition Partners, LP, Liquid Titan, LLC, and Seaport Refining and Environmental, LLC.

<sup>17</sup> Petition for Review, *Allied Energy Company, Gladieux Trading and Marketing, Insight Equity Acquisition Partners, LP, LiquidTitan, LLC, and Seaport Refining and Environmental LLC, v. Respondent; U.S. Environmental Protection Agency*, United States Court of Appeals for the District of Columbia Circuit, Case 10-1146, Document 1252640, Filed 06/29/2010.

compelling reason not to extend the 500 ppm diesel transmix flexibility beyond 2014 if such costs can be avoided or deferred without affecting the benefits from the diesel sulfur program. A settlement agreement has been finalized between EPA and the petitioners under which EPA would propose regulatory changes to reintroduce the 500-ppm LM transmix diesel flexibility for legacy LM equipment.<sup>18</sup> The proposed amendments to the diesel transmix provisions contained in today's action are in accord with the settlement agreement.

Our analysis indicates that extending the 500-ppm LM flexibility beyond 2014 would have a neutral or net beneficial effect on overall emissions. The use of 500-ppm LM from transmix would be limited to older technology engines that do not possess sulfur-sensitive emission control technology. We believe that the proposed 500-ppm LM segregation and other associated requirements would prevent misfueling of sulfur-sensitive engines.

To evaluate the environmental consequences of extending the diesel transmix provisions, we compared the potential increase in sulfate particulate matter (PM) from the use of 500 ppm LM from transmix in older engines to the additional transportation emissions associated with shipment to the Category 3 (C3) marine market which might be deferred by allowing continued access to the 500 ppm LM market. Markets for locomotive and marine diesel tend to be nearer to transmix processing facilities than markets for C3 marine diesel. Therefore, extending the diesel transmix provisions would result in a reduction in nitrogen oxides (NO<sub>x</sub>), volatile organic compounds (VOCs),

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<sup>18</sup> Notice of Proposed Settlement Agreement, Request for Public Comment, 76 FR 56194 (September 12, 2011).



carbon monoxide (CO), as well as PM emissions that would otherwise be associated with transporting transmix distillate product to the more distant C3 market.

Although some batches of transmix distillate product may approach the 500 ppm sulfur limit, we estimate that the average sulfur content of transmix distillate product would be no more than 300 ppm.<sup>19</sup> We estimate that approximately 500 million gallons of distillate fuel per year is produced from transmix.<sup>20</sup> Assuming that all of the transmix distillate product would be used as 500 ppm LM in older engines, we estimate that an additional 70 tons of sulfate PM would be produced annually compared to the use of 15 ppm diesel fuel.<sup>21</sup> We believe that a substantial fraction of transmix distillate product would be used as heating oil and C3 diesel fuel regardless of whether the diesel transmix provisions are extended. Also, as the older LM engines are retired from service, the size of the potential 500 ppm LM market will diminish until all LM engines must use 15 ppm diesel fuel. Therefore, assuming that all transmix distillate product would be used as 500 ppm LM provides an upper bound estimate of the potential impact on PM emissions. We estimate on average that transmix processors would need to ship their transmix distillate product an additional 150 miles by tank truck to reach the C3 Emission Control Area (ECA) marine market as compared to the 500 ppm LM market.<sup>22</sup> This would result in an additional 80 tons of PM emissions annually. Thus, the PM emissions associated with transport to the C3 marine market are roughly equal to the increased sulfate PM emissions associated with the continued use of 500 ppm LM. We estimate that the

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<sup>19</sup> This is based on our review of data on the sulfur levels of transmix distillate product from various transmix processors.

<sup>20</sup> Based on information provided by transmix processors, we estimate that approximately 750 million gallons per year of transmix is produced annually and that 2/3 of the transmix-derived product is distillate fuel and 1/3 is gasoline.

<sup>21</sup> Sulfate PM was converted to PM<sub>2.5</sub> to allow a comparison with PM<sub>2.5</sub> from increased fuel transport emissions.

<sup>22</sup> There is no ability to ship transmix distillate product to the C3 marine diesel market by pipeline.

increased transport distances could also result in an additional 2,200 tons of NO<sub>x</sub>, 220 tons of VOC, and 650 tons of CO annually. Based on the above discussion, we believe that the proposed extension of the 500 ppm LM provisions beyond 2014 outside the NEMA area and Alaska would have a neutral or positive environmental impact.

The extension of the 500-ppm LM transmix flexibility would defer additional transportation costs and provide a lower-cost fuel for use in older LM engines for many years to come given that the useful life of LM engines can exceed 40 years.<sup>23</sup> Therefore, extending this flexibility would reduce the overall burden on industry of compliance with EPA's diesel sulfur program. Providing additional time for transmix processors to evaluate how the C3 ECA marine market will develop after 2014 would also facilitate a smoother transition for transmix processors from the 500-ppm LM market as it gradually disappears due to fleet turnover.

#### **B. Proposed Diesel Transmix Provisions**

Industry stakeholders suggested alternative enforcement mechanisms to support the extended flexibility which would not necessitate reinstating and expanding the designate-and-track and fuel marker provisions that were retired by the C3 marine final rule. Reinstatement and expansion of these provisions would likely place an unacceptable burden on a large number of stakeholders, most of whom would not handle 500-ppm LM. The suggested alternative enforcement mechanism would impose minimal additional reporting and recordkeeping burdens only on the parties that produce, handle, and use 500-ppm LM. We believe that this alternative enforcement approach would meet the Agency's goals of ensuring that the pool of 500-ppm LM is limited to transmix

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<sup>23</sup> In the 2011 edition of "Railroad Facts," the Association of American Railroads reported that in 2010 approximately 35% of the locomotive fleet was at least 21 years old.

distillate and that 500-ppm LM is not used in sulfur-sensitive emissions control equipment.

The compliance assurance provisions that we are proposing to support the extension of the diesel transmix flexibility are similar to those that were used to support the small refiner flexibilities in Alaska during the phase-in of EPA's diesel sulfur program.<sup>24</sup> In addition to registering as a refiner and certifying that each batch of fuel complies with the fuel quality requirements for 500-ppm LM diesel fuel, producers of 500-ppm transmix distillate product would be required to submit a compliance plan for approval by EPA. This compliance plan would provide details on how the 500-ppm LM would be segregated through to the ultimate consumer and its use limited to the legacy LM fleet. The plan would be required to identify the entities that would handle the fuel and the means of segregation. We believe that it is appropriate to limit the number of entities that would be allowed to handle the fuel between the producer and the ultimate consumer in order to facilitate EPA's compliance assurance activities.<sup>25</sup> Based on conversations with transmix processors, we believe that specifying that no more than 4 separate entities handle the fuel between the producer and the ultimate consumer would not hinder the ability to distribute the fuel.<sup>26</sup> The plan would need to identify the ultimate consumers and include information on how the product would be prevented from being used in sulfur-sensitive equipment.

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<sup>24</sup> See 40 CFR § 80.554(a)(4).

<sup>25</sup> An entity is defined as any company that takes custody of 500-ppm LM diesel fuel.

<sup>26</sup> In most cases, fewer entities would take custody of the product. In many cases, only a single entity (a tank truck operator) would be in the distribution chain between the transmix processor and the ultimate consumer. However, we understand that as many as 4 separate entities may handle the product between the producer and ultimate consumer if it is shipped by pipeline: the tank truck operator to ship the product from the producer to the pipeline, the pipeline operator, the product terminal that receives the fuel from the pipeline, and another tank truck operator to ship the product to the ultimate consumer from the terminal.

We understand that some transmix processors currently rely on shipment by pipeline to reach the 500-ppm locomotive diesel market.<sup>27</sup> We are proposing that 500-ppm LM could be shipped by pipeline provided that it does not come into contact with distillate products that have a sulfur content greater than 15 ppm. The compliance plan would need to include information from the pipeline operator regarding how this segregation would be maintained. Discussions with transmix processors indicate that this requirement would not limit their ability to ship 500-ppm LM by pipeline. If 500-ppm LM was shipped by pipeline abutting 15-ppm diesel, the volume of 500-ppm LM delivered would likely be slightly greater than that which was introduced into the pipeline as a consequence of cutting the pipeline interface between the two fuel batches into the 500-ppm LM batch. This small increase in 500-ppm LM volume would be acceptable.

To provide an additional safeguard to ensure that volume of 500 ppm LM diesel fuel does not swell inappropriately, the volume increase during any single pipeline shipment must be limited to 2 volume percent or less. This limitation on volume swell to 2 volume percent or less is consistent with the limitation in 40 CFR § 80.599 (b)(5) regarding the allowed swell in volume during the shipment of highway diesel fuel for the purposes of the determination of compliance with the now expired volume balance requirements under 40 CFR § 80.598(b)(9)(vii)(B). Industry did not object to this requirement, and therefore, we believe that limiting the volume swell of 500 ppm LM diesel fuel during shipment by pipeline to 2 volume percent or less should provide sufficient flexibility.

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<sup>27</sup> 500 ppm LM diesel fuel is shipped by a short dedicated pipeline from a product terminal to a locomotive refueling facility.

Product transfer documents (PTDs) for 500-ppm LM diesel would be required to indicate that the fuel must be distributed in compliance with the approved compliance assurance plan. Entities in the distribution chain for 500-ppm LM diesel fuel would be required to keep records on the volumes of the 500-ppm that they receive from and deliver to each other entity. Based on input from fuel distributors, keeping these records will be a minimal additional burden, as discussed in section X.B. Such entities would also be required to keep records on how the fuel was transported and segregated. We would typically expect that the volumes of 500-ppm LM delivered would be equal to or less than those received unless shipment by pipeline occurred. Some minimal increase in 500-ppm LM volume would be acceptable due to differences in temperature between when the shipped and received volumes were measured and interface cuts during shipment by pipeline. Entities that handle 500-ppm LM would be required to calculate a balance of 500-ppm LM received versus delivered/used on an annual basis. If the volume of fuel delivered/dispensed is greater than that received, EPA would expect that the records would indicate the cause. EPA requests comment on whether it is appropriate to set an upper limit on the potential volume increase due to pipeline shipment and temperature swell, and if 2 percent would be an appropriate upper limit. If an entity's evaluation of their receipts and deliveries of 500-ppm LM fuel indicated noncompliance with the product segregation requirements, the custodian would be required to notify EPA. All entities in the 500-ppm LM distribution chain would be required to maintain the specified records for 5 years and provide them to EPA upon request.

**C. Consideration of Extending the Diesel Transmix Provisions to Include the Northeast Mid-Atlantic Area**

The nonroad diesel rule specified that the small diesel refiner, credit, and transmix provisions would not apply in the Northeast Mid-Atlantic (NEMA) area. Hence, all LM diesel fuel shipped from refineries, transmix processors, and importers for use in the NEMA Area must meet a 15-ppm sulfur standard beginning June 1, 2012 when the 15-ppm standard becomes effective for large refiners and importers.<sup>28</sup> This approach allowed the NEMA area to be exempted from fuel marker provisions that are a component of the compliance assurance provisions associated with the small diesel refiner, credit, and transmix provisions. As discussed previously a significant factor in the decision made in the nonroad diesel rule to exclude the NEMA from the diesel transmix provisions was our assessment that the heating oil market would provide a sufficient outlet for transmix distillate product in this area. Since the publication of the nonroad diesel rule in 2004, a number of states in the NEMA area have moved towards implementing a 15-ppm sulfur standard for heating oil. A significant fraction of heating oil in the area will be subject to a 15-ppm sulfur standard beginning in 2012, and it is likely that other states will adopt a 15-ppm sulfur standard for heating oil in the following years.

Transmix processors and other fuel distributors in the NEMA area stated that they were concerned that the changing state heating oil specifications would impact their ability to market transmix distillate product beginning in 2012 and increasingly over time. They requested that EPA extend the 500-ppm LM flexibility to the NEMA area by 2012 to lessen the impact on the fuel distribution system of complying with more stringent federal and state distillate sulfur standards. They stated that the enforcement

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<sup>28</sup> LM diesel fuel in terminals located in the NEMA area is subject to a 15-ppm sulfur standard beginning August 1, 2012. LM diesel fuel at retailers and wholesale purchaser consumers must meet a 15-ppm sulfur standard beginning October 1, 2012.

mechanisms proposed above for use outside of the NEMA area after 2014 could apply equally well within the NEMA area beginning in 2012. They also stated that extending the proposed flexibility to inside the NEMA would not have an adverse environmental impact because of the potential to defer significant additional transportation emissions to the more distant C3 marine market.

The proposed provisions that would allow 500-ppm LM from transmix to be used outside of the NEMA area after 2014 would reinstate a flexibility that was withdrawn by the C3 marine final rule. Allowing 500-ppm LM to be used inside the NEMA area would provide more flexibility than was previously included in EPA's diesel program. We believe that extending the 500-ppm transmix flexibility to include the NEMA area will reduce distribution costs for their distillate product from transmix processors. Consequently, we are requesting comment on applying the proposed 500-ppm LM transmix provisions discussed above to the NEMA area beginning June 2012.<sup>29</sup> Given the current transition in the NEMA area to the use of 15-ppm sulfur heating oil, it would be most useful to industry if the proposed flexibility could become effective as soon as possible.

Similar to our analysis for outside of the NEMA area, our analysis of the potential environmental consequences of extending the diesel transmix flexibility to include the NEMA area indicates the effect on emissions would be neutral or positive. We also agree that the compliance assurance requirements that we are proposing for outside of the NEMA area could be applied within the NEMA area. A substantial fraction of the transmix processing industry markets fuel within the NEMA area. Thus, the potential

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<sup>29</sup> Prior to 2014, parties outside of the NEMA area who distribute 500-ppm LM would be covered by the existing compliance assurance requirements.

cost reduction to industry and additional time to prepare for a transition to other markets for transmix distillate product that would be afforded by an extension of the proposed provisions to the NEMA would be significant.

The implementation of the 1,000-ppm sulfur C3 marine fuel requirements in 2014 would provide another outlet for transmix distillate product in the NEMA area to replace the disappearing above-15-ppm sulfur heating oil market. We request comment on whether, if we were to extend the 500-ppm LM transmix flexibility to inside the NEMA area, such an extension should be limited to the time period until the C3 marine fuel requirements becomes effective.

## **VII. Amendments Related to the Marker Requirements for Locomotive and Marine Fuel**

We also propose to amend the regulatory provisions regarding the transition in the fuel marker requirements for 500 ppm LM diesel fuel in 2012 to address an oversight in the original rulemaking where the regulations failed to incorporate provisions described in the rulemaking preamble. Today's proposed rule would amend the regulatory provisions regarding the transition in the fuel marker requirements for heating oil in 2014 to provide improved clarity.

The preamble in the nonroad diesel final rule stated that EPA intended to allow 500 ppm LM diesel fuel containing greater than 0.10 milligrams per liter of solvent yellow 124 (SY124) to be present at any location in the fuel distribution system (up to and including retail and wholesale-purchaser-consumer storage tanks) until September 30, 2012.<sup>30</sup> Although it was not explicitly stated in the preamble, it was implied that additional time would be allowed for marked 500 ppm LM to transition from the fuel

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<sup>30</sup> "Control of Emissions for Air Pollution From Nonroad Diesel Engines and Fuel; Final Rule," Section V.C.1.c., "The Period From June 1, 2012 Through May 31, 2014, 69 FR 39083, 39084 (June 29, 2004).



tanks connected to locomotive and marine engines, consistent with the approach taken regarding the implementation of more stringent diesel fuel sulfur standards. However, the nonroad diesel regulations are not consistent with the preamble and do not provide the allowance for marked 500 ppm LM diesel fuel to transition from fuel distribution and end-user tanks. 40 CFR § 80.510(e) requires that all 500 ppm LM diesel fuel delivered from a truck loading rack located outside of the Northeast Mid-Atlantic (NEMA) area and Alaska must contain at least 6 mg/liter of SY124 through May 31, 2012. However, the regulatory text at 40 CFR 80.510(f) requires that beginning June 1, 2012, any diesel fuel that contains 0.10 mg/liter of SY124 must be designated as heating oil. Thus, the regulations as currently written do not provide any transition time for marked LM fuel that is present in the distribution system as of May 31, 2012 to work its way through the fuel distribution system downstream of the truck loading rack and through the tanks connected to locomotive and marine engines.

A number of locomotive and marine wholesale purchaser-consumers have taken custody of marked 500 ppm LM diesel fuel that they will not be able to consume prior to June 1, 2012. A number of fuel suppliers also have inventories of 500 ppm LM diesel fuel on hand that they may not be able to sell to LM diesel fuel users because such users are concerned about clearing their tanks of marked LM diesel fuel by June 1, 2012. We are proposing to allow marked 500 ppm LM diesel fuel to transition normally through the fuel distribution and use system, consistent with the original intent of the nonroad diesel rule preamble. Today's proposed rule would allow 500 ppm LM diesel fuel at any point in the fuel distribution and end use system to contain more than 0.10 milligrams per liter of SY 124 through November 30, 2012.

We are proposing to implement a single transition date applicable at all points in the fuel distribution and use system rather than a separate date applicable through retail and wholesale-purchaser-consumer (WPC) facilities and another date applicable at all locations including the tanks attached to locomotive and marine equipment because we believe that a stepped compliance schedule is not necessary and a single transition date provides the most flexibility for regulated parties. We expect that the marker will typically transition out of retailer and WPC LM diesel storage tanks well in advance of November 30, 2012. We further expect that users of LM diesel fuel can coordinate with retail and WPC facilities regarding deliveries of marked 500 ppm LM diesel fuel to ensure that the fuel in storage tanks attached to LM equipment is in compliance by November 30, 2012.

Today's proposed rule would also amend the regulation to clarify the transition of the solvent yellow 124 marker out of heating oil beginning June 1, 2014. Specifically, today's proposal would amend the regulations to clarify that after December 1, 2014, EPA will no longer have any requirements with respect to the use of the solvent yellow 124 marker. This is consistent with the intent expressed in our original nonroad diesel fuel rulemaking. We do not believe these proposed changes will adversely impact emissions.

### **VIII. Statutory and Executive Order Reviews**

#### *A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review*

Under Executive Order 12866 (58 CFR § 51735 (October 4, 1993), this action is a "significant regulatory action." Accordingly, EPA submitted this action to the Office of Management and Budget (OMB) for review under Executive Orders 12866 and 13563

(76 FR 3821 (January 21, 2011) and any changes made in response to OMB recommendations have been documented in the docket for this action.

*B. Paperwork Reduction Act*

The information collection requirements in this notice of proposed rulemaking and direct final rule have been submitted for approval to the Office of Management and Budget (OMB) under the Paperwork Reduction Act, 44 U.S.C. 3501 *et. seq.* The Information Collection Request (ICR) document prepared by EPA related to the amended heating oil definition has been assigned EPA ICR number 2462.01 and the ICR document prepared by EPA for diesel fuel produced by transmix producers has been assigned EPA ICR number 2463.01. Supporting statements for these proposed ICRs have been placed in the docket. The proposed information collections are described in the following paragraphs.

This action contains recordkeeping and reporting (registration and product transfer documentation) that may affect parties who produce or import renewable fuels subject to the proposed revised definition of heating oil. EPA expects that very few parties will be subject to additional recordkeeping and reporting. We estimate that up to 11 parties (*i.e.*, RIN generators, consisting of up to 10 producers and one importer) may be subject to the proposed information collection over the next several years.<sup>31</sup> We estimate an annual reporting burden of 21 hours per respondent and an annual recordkeeping burden of 24 hours, yielding a total per respondent burden of 45 hours.<sup>32</sup> Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency.

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<sup>31</sup> We project that the number of effected parties will remain essentially constant over time.

<sup>32</sup> This includes the time to train staff, formulate and transmit responses, and other miscellaneous compliance related activities.

This includes the time needed to review the instructions; develop, acquire, install, and utilize technology and systems for the purpose of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transit or otherwise disclose the information. Burden is as defined at 5 CFR § 1320.3(b).

This action also contains provisions related to diesel fuel that is produced by transmix processors. We have proposed reporting requirements that would apply to transmix processors (all of whom are refiners) and other parties (such as carriers or distributors) in the distribution chain who handle diesel fuel produced by transmix producers. The collected data will permit EPA to: (1) Process compliance plans from transmix producers; and (2) Ensure that diesel fuel made from transmix meets the standards required under the regulations at 40 CFR Part 80, and that the associated benefits to human health and the environment are realized. We estimate that 25 transmix processors and 150 other parties may be subject to the proposed information collection.<sup>33</sup> We estimate an annual reporting burden of 28 hours per transmix processor (respondent) and 8 hours per other party (respondent); considering all respondents (transmix producers and other parties) who would be subject to the proposed information collection, the annual reporting burden, per respondent, would be 11 hours. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or

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<sup>33</sup> This is based on current transmix production. Although the total volume of transmix produced in the fuel distribution system may decline in parallel with the projected decrease in overall petroleum-based fuel use, we anticipate that the number of transmix processors will remain essentially constant since their number is dependent on the configuration of the petroleum-based fuel distribution system.

disclose or provide information to or for a Federal agency. This includes the time needed to review the instructions; develop, acquire, install, and utilize technology and systems for the purpose of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transit or otherwise disclose the information. Burden is as defined at 5 CFR § 1320.3(b).

The proposed amendments to the fuel marker requirements for locomotive and marine diesel fuel in today's proposed rule do not contain any new recordkeeping and reporting requirements.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations are listed in 40 CFR part 9.

To comment on the Agency's need for this information, the accuracy of the provided burden estimates, and any suggested methods for minimizing respondent burden, EPA has established a public docket for this rule, which includes the ICRs described above, under Docket ID number EPA-HQ-OAR-2012-0223. Submit any comments related to the ICR to EPA and OMB. See the **ADDRESSES** section at the beginning of this notice for where to submit comments to EPA. Send comments to OMB at the Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th Street, NW, Washington, DC 20503, Attention: Desk Office for EPA. Since OMB is required to make a decision concerning the ICR between 30 and 60 days after

**[Insert date of publication in the Federal Register.]**, a comment to OMB is best assured of having its full effect if OMB receives it by **[Insert date 30 days after publication in the Federal Register.]**.

*C. Regulatory Flexibility Act*

The Regulatory Flexibility Act (RFA) generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

For purposes of assessing the impacts of today's rule on small entities, small entity is defined as: (1) A small business as defined by the Small Business Administration's (SBA) regulations at 13 CFR § 121.201; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impacts of this action on small entities, I certify that this proposed rule will not have a significant economic impact on a substantial number of small entities. This proposed rule will not impose any new requirements on small entities. The relatively minor corrections and modifications this proposed rule makes to the final RFS2 regulations do not impact small entities. The proposed amendments to the diesel transmix provisions would lessen the regulatory burden on all

affected tranmix processors and provide a source of lower cost locomotive and marine diesel fuel to consumers. We continue to be interested in the potential impacts of the rule on small entities and welcome comments on issues related to such impacts.

#### *D. Unfunded Mandates Reform Act*

This proposed rule does not contain a Federal mandate that may result in expenditures of \$100 million or more for State, local, and tribal governments, in the aggregate, or the private sector in any one year. We have determined that this action will not result in expenditures of \$100 million or more for the above parties and thus, this rule is not subject to the requirements of sections 202 or 205 of UMRA.

This proposed rule is also not subject to the requirements of section 203 of UMRA because it contains no regulatory requirements that might significantly or uniquely affect small governments. It only applies to gasoline, diesel, and renewable fuel producers, importers, distributors and marketers and makes relatively minor corrections and modifications to the RFS2 and diesel sulfur regulations.

#### *E. Executive Order 13132 (Federalism)*

This action does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. This action only applies to gasoline, diesel, and renewable fuel producers, importers, distributors and marketers and makes relatively minor corrections and modifications to the RFS2 and diesel sulfur regulations. Thus, Executive Order 13132 does not apply to this action.

In the spirit of Executive Order 13132, and consistent with EPA policy to promote communications between EPA and State and local governments, EPA specifically solicits comment on this proposed action from State and local officials.

*F. Executive Order 13175 (Consultation and Coordination With Indian Tribal Governments)*

This proposed rule does not have tribal implications, as specified in Executive Order 13175 (65 FR 67249 (November 9, 2000)). It applies to gasoline, diesel, and renewable fuel producers, importers, distributors and marketers. This action makes relatively minor corrections and modifications to the RFS and diesel sulfur regulations, and does not impose any enforceable duties on communities of Indian tribal governments. Thus, Executive Order 13175 does not apply to this action. Nonetheless, EPA specifically solicits additional comment on this proposed action from tribal officials.

*G. Executive Order 13045: Protection of Children from Environmental Health Risks and Safety Risks*

EPA interprets EO 13045 (62 FR 19885 (April 23, 1997)) as applying only to those regulatory actions that concern health or safety risks, such that the analysis required under section 5–501 of the EO has the potential to influence the regulation. This action is not subject to EO 13045 because it does not establish an environmental standard intended to mitigate health or safety risks.

*H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use*

This action is not a “significant energy action” as defined in Executive Order 13211 (66 FR 28355 (May 22, 2001)), because it is not likely to have a significant



adverse effect on the supply, distribution, or use of energy. We have concluded that this rule is not likely to have adverse energy effects because we do not anticipate adverse energy effects related to the additional generation of RINs for home heating oil or the reduced regulatory burden for transmix processors. This proposed rule would facilitate the use of 500 ppm sulfur locomotive and marine (LM) diesel fuel, which contains the SY 124 marker that is already in the fuel distribution and use system consistent with EPA's original intent. Today's action will avoid the potential need to remove marked 500 ppm LM diesel fuel from the system for reprocessing, and the associated increased costs and potential disruption to the supply of LM diesel fuel.

#### *I. National Technology Transfer and Advancement Act*

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (“NTTAA”), Public Law 104–113, 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

This action does not involve technical standards. Therefore, EPA did not consider the use of any voluntary consensus standards.

#### *J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations*

Executive Order (EO) 12898 (59 FR 7629 (February 16, 1994)) establishes Federal executive policy on environmental justice. Its main provision directs Federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States.

EPA has determined that this proposed rule will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it does not affect the level of protection provided to human health or the environment. These amendments would not relax the control measures on sources regulated by the RFS regulations and therefore would not cause emissions increases from these sources. We have determined that proposed amendments to the diesel transmix provisions and marker provisions for locomotive and marine diesel fuel under the diesel sulfur program would have a neutral or positive impact on diesel vehicle emissions.<sup>34</sup>

## **IX. Statutory Provisions and Legal Authority**

Statutory authority for the rule finalized today can be found in section 211 of the Clean Air Act, 42 U.S.C. 7545. Additional support for the procedural and compliance related aspects of today's rule, including the recordkeeping requirements, come from Sections 114, 208, and 301(a) of the Clean Air Act, 42 U.S.C. 7414, 7542, and 7601(a).

List of Subjects in 40 CFR Part 80

Environmental protection, Administrative practice and procedure, Agriculture, Air pollution control, Confidential business information, Diesel Fuel, Transmix, Energy,

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<sup>34</sup> See section VI and VII of today's notice for details of this analysis.

Forest and Forest Products, Fuel additives, Gasoline, Imports, Labeling, Motor vehicle pollution, Penalties, Petroleum, Reporting and recordkeeping requirements.

Dated: September 17, 2012

Lisa P. Jackson, Administrator

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